

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

PAUL J. KEENER v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
No. 89295 Mary Beth Leibowitz, Judge**

No. E2008-01345-CCA-R3-PC - Filed January 21, 2009

The petitioner, Paul J. Keener, appeals as of right from the post-conviction court's order summarily dismissing his petition for post-conviction relief. The State has filed a motion requesting that this court affirm the order pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Following our review, the State's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, J.J., joined.

Paul J. Keener, Whiteville, Tennessee, Pro Se.

Robert E. Cooper, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

The record reflects that the petitioner was convicted by a Knox County jury of aggravated kidnapping, armed robbery, and felonious escape in May 1982. The trial court sentenced the petitioner to fifty years, ten years and two to five years, respectively, to be served consecutively. On direct appeal, this court affirmed the convictions and sentences. State v. Paul J. Keener, No.901 (Tenn. Crim. App. Aug. 11, 1983). On April 28, 1989, the petitioner filed his first post-conviction petition alleging that he was mentally incompetent and legally insane at the time of the offenses and that his convictions were the result of the ineffective assistance of counsel. Following a series of evidentiary hearings, the post-conviction court denied relief on the merits. This court affirmed the denial on appeal. Paul J. Keener v. State, No. 03C01-9410-CR-00374, 1994 WL 805878 (Tenn. Crim. App. June 6, 1995), perm. app. denied (Tenn. Nov. 6, 1995).

On May 30, 2008, the petitioner filed a second petition for post-conviction relief alleging insufficient evidence to support his convictions. Upon review of the petition, the post-conviction court summarily dismissed the petition both because it was filed outside the statute of limitations and it was a second petition alleging no basis to reopen the previously ruled upon petition. This timely appeal followed.

Tennessee's Post-Conviction Procedure Act provides that a claim for post-conviction relief must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred." Tenn. Code Ann. § 40-30-102(a) (2006). There are few exceptions to this limitations period. The Post-Conviction Procedure Act provides that a petition may be filed beyond the expiration of the one-year limitations period if the otherwise untimely claim (1) is based on a constitutional right that did not exist at trial, (2) is based on new scientific evidence, or (3) seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b)(1)-(3). Although the petitioner alleges the existence of a surveillance video of the offense that would show he is not guilty of aggravated kidnapping but instead is guilty of a "hostage taking," such evidence was available at the time of trial and does not qualify as a statutory exception to toll the statute of limitations. Furthermore, we can discern from his pleadings that the allegation amounts to an additional attempt to attack the sufficiency of the evidence to support his convictions, which has been ruled upon previously on direct appeal to this court. Therefore, we conclude that none of the statutory exceptions to toll the limitations period apply in this case.

Some situations may occur where due process would require the tolling of the statute of limitations, such as mental incompetence or attorney misrepresentation that denies a petitioner the reasonable opportunity to assert a claim in a meaningful time and manner when that failure to file timely is due to circumstances beyond the petitioner's control. State v. McKnight, 51 S.W.3d 559, 563 (Tenn. 2001); Williams v. State, 44 S.W.3d 464 (Tenn. 2001); Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). However, none of these situations is alleged or apparent from the record in this case.

Additionally, as noted by the post-conviction court, the instant petition is the second petition for post-conviction relief filed by the petitioner attacking these convictions. The Post-Conviction Procedure Act specifically "contemplates the filing of only one (1) petition for post-conviction relief" and provides that "[i]n no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." Tenn. Code Ann. § 40-30-102(c). Tennessee Code Annotated section 40-30-102(c) requires that any subsequent petition be summarily dismissed if a prior petition was resolved on the merits, as occurred in this case. Furthermore, the instant petition does not allege any facts sufficient to support a motion to reopen pursuant to Tennessee Code Annotated section 40-30-117(a)(1)-(4). As such, it is barred by statute.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the post-conviction court's summary dismissal of the time-barred second petition for post-conviction relief was appropriate. Accordingly, the State's motion is granted. The judgment of the post-conviction court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

D. KELLY THOMAS, JR., JUDGE